

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
SITE REMEDIATION PROGRAM
PROCESSING OF DAMAGE CLAIMS PURSUANT TO THE SANITARY
LANDFILL FACILITY CLOSURE AND CONTINGENCY FUND ACT**

Proposed Readoption: N.J.A.C. 7:11

Authorized by: Bradley M. Campbell, Commissioner

Department of Environmental Protection

Authority: N.J.S.A. 13:1B-3, 13:1D-9, 13:1E-100 et seq. (particularly 13:1E-106 and 13:1E-114), and 58:10-23.11 et seq.

DEP Docket Number: 03-04-02/153

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Submit written comments by May 15, 2004 to:

Karen Hershey, Esq.

Attn.: DEP Docket No.

Office of Legal Affairs

Department of Environmental Protection

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The Department strongly recommends that commenters submit comments on diskettes as well as on paper. Please submit 3 ½ inch diskettes or compact discs read-only-memory (CD-ROM). The Department will be able to upload the comments onto its office automation equipment, thereby saving the Department considerable time in not having to retype the comments. The Department will use the paper version of the comments to ensure that the uploading was accomplished successfully. Submission of the disk is not a requirement. The Department will accept all comments submitted in writing prior to the end of the comment period.

The Department prefers Microsoft Word 6.0 or above; however, other word processing software which can also be read or used by Microsoft Word 6.0 is acceptable. Macintosh formats should not be used.

Text enhancements such as underlines, bold, etc. are often not converted from one software to another. Therefore, when suggesting text revisions involving additions/deletions, the revised text should be presented without enhancements, as it would appear in the rule.

Comments on the summary should be included with the comments on the pertinent section of the rule text wherever possible to eliminate duplicate comments and facilitate the Department's task in organizing and responding to comments. Since comments will be sorted electronically, the following format should be used for each comment:

Citation COMMENT: Comment text. (Company name). For example:

N.J.A.C. 7:11-1.6(e) COMMENT: The process for approving claims should be simplified. (ABC Corporation).

The agency proposal follows:

Summary

As the Department is providing a 60-day comment period on this notice of proposal, this proposal is exempted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

In accordance with the “sunset” provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act (Landfill Claims rules), N.J.A.C. 7:11, are scheduled to expire on February 22, 2004. This expiration date has been extended by 180 days to August 21, 2004 pursuant to N.J.S.A. 52:14B-5.1c. As required by the Administrative Procedure Act, the Department of Environmental Protection (the Department) has evaluated these rules, and has determined that they are necessary, reasonable and proper for the purpose for which they were originally promulgated, as proposed herein and discussed below.

The Legislature established the Sanitary Landfill Facility Closure and Contingency Fund (“the SLF Fund”) when it enacted the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J.S.A. 13:1E-100 et seq., (“the SLF Act”) in 1981. The purpose of the SLF Fund is to provide compensation for damages resulting from the improper operation or closure of sanitary landfills facilities. The fund is “strictly liable for all direct and indirect damages, no matter by whom sustained, proximately resulting from the operations or closure of any sanitary landfill.” (See, N.J.S.A. 13:1E-106a.) Historically, the SLF Fund has paid claims predominately to individual homeowners impacted by improperly operated and closed landfill facilities after the homeowners have exhausted all other reasonably available sources for compensation. The Fund has also been utilized by the Department to perform priority cleanups at severely contaminated landfill sites.

The Department is proposing to readopt the Sanitary Landfill Fund claim processing rules without change. The following is a summary of each Subchapter that is proposed for readoption.

N.J.A.C. 7:11-1, General Provisions, sets forth the general provisions of these rules including their scope and purpose, construction and applicability, severability, delegation, definitions, the liabilities for damages, signatures and certifications, notices and other communications, and the computation of time under the chapter.

N.J.A.C. 7:11-2, Claims Generally, sets forth the general requirements for a person submitting a claim for damages to the Department. In general, a claim is eligible for compensation only if the claimant has actually suffered damages. In addition, this section also requires that the claimant has exercised reasonable diligence and ordinary

care to prior to purchasing property near a sanitary landfill facility and to take affirmative measures to prevent the damages from occurring in the first instance or from increasing or being aggravated. In addition, N.J.A.C. 7:11-2 sets forth the restrictions on claims by responsible parties or by owners or operators of the sanitary landfill which is the subject of a claim, and the procedure by which the Department may administratively close a claim.

N.J.A.C. 7:11-3, Claims Procedures, establishes the procedure for submission and initial processing of claims. As provided by this subchapter, claims must be filed with the Department no later than one year after the date of the discovery of damages, or in the case of property diminution claims, within one year of the sale of the property. This subchapter also contains the requirements for the content of the claim, as well as how to determine if the claim has been timely filed.

N.J.A.C. 7:11-4, Property Value Diminution Claims, establishes the criteria for measuring and processing claims for any reduction in the value of property proximately resulting from the improper operation or closure of a sanitary landfill facility. Subchapter 4 also establishes requirements that must be satisfied if a property value diminution claim is to be eligible for compensation, including the requirements for appraisals of the subject property and other information affecting the property value.

N.J.A.C. 7:11-5, Settlement and Determination of Claim, establishes the procedure through which the claimant must notify the Department if the claimant settles privately with any owner or operator or other person. This subchapter also establishes the procedure to pay the claim through which the Department will notify a claimant of its decision to either deny or pay the claim through the issuance of a Notice of Intent (NOI). Subchapter 5 also outlines the procedure for requesting an adjudicatory hearing if the Department issues a final decision denying the claim.

N.J.A.C. 7:11-6, Conditions of Payment, sets forth the procedure the Department will follow in paying claims from the SLF Fund. In addition, Subchapter 6 also provides that the Department shall not make any payment from the SLF Fund unless the Department acquires all rights of the claimant to recovery of the damages from the owner or operator of the sanitary landfill facility.

Social Impact

The existing SLF rules set forth at N.J.A.C. 7:11 have had a positive social impact by providing claimants with the means of obtaining reimbursement for losses suffered in connection with the improper operation or improper closure of sanitary landfill facilities. The proposed readoption will continue to have a positive social impact upon claimants by providing them with specific, orderly procedures for making claims against the SLF Fund.

Economic Impact

N.J.A.C. 7:11 has had a positive economic impact upon persons who have who have been impacted by the improper operation or improper closure of sanitary landfill facilities by providing a method for these persons to obtain compensation for such

damages. By providing clear claims processing requirements, these rules reduce case-by-case decision making, and help ensure that those who have been damaged are compensated fairly and uniformly. In addition, by providing guidance as to what claims will and will not be compensable, these rules have been able to help preserve the limited assets of the SLF Fund so that funds are available to pay other eligible claims. The Department expects that the proposed readoption will continue to have a positive economic impact on the State.

These rules further support the Department's policy that damages must proximately result from the improper operation or improper closure of a sanitary landfill facility. Claims for damages arising from typical operations of sanitary landfill facilities will therefore, continue to be ineligible for compensation. Thus, the proposed readoption of these rules will continue to preserve the assets of the Fund, thereby ensuring the availability of funds for eligible SLF claims and the proper closure of sanitary landfill facilities.

Environmental Impact

The rules proposed for readoption will continue to have a positive environmental impact. As discussed in the Economic Impact Statement above, the proposed readoption will continue to prevent the potential overpayments of claims in certain situations, which would otherwise reduce the assets of the Fund. This will ensure that funds are preserved to reimburse claimants for damages that are proven by a preponderance of the evidence to be proximately caused by the improper operation or closure of a sanitary landfill facility. Providing reimbursement from the Fund for environmental damages will encourage a timelier remediation of property thus limiting potential exposure to contaminants. Therefore, this readoption will continue to have a positive environmental impact.

Federal Standards Statement

Executive Order No. 27(1994) and N.J.S.A. 52:14B-1 et seq. require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. The proposed readoption of N.J.A.C. 7:11 is not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards or requirements. Accordingly, Executive Order No. 27(1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal standards analysis.

Jobs Impact

The existing SLF Fund rules have had a positive effect on jobs within the State by providing funding which has permitted certain businesses, such as real estate appraisers and environmental cleanup firms and associated vendors, with a greater source of business. The proposed readoption will continue to have the same impact on jobs within the state as they serve to clarify the implementation of the rules and provide consistency between the SLF Fund rules and the Spill Fund rules. In addition, if the subject property is reused or is redeveloped, new permanent jobs may result, thus having an added positive impact on jobs in the state.

Agriculture Industry Impact

The proposed readoption of the SLF Fund rule will have a positive impact on agriculture. The rules apply to farms and agricultural land, as any other properties in the state, that have been damaged as a proximate result of an improperly closed or operated landfill facility. Thus, the proposed readoption will provide owners and operators of farms with the means of obtaining reimbursement for losses suffered in connection with the improper operation or closure of a nearby sanitary landfill facility.

Regulatory Flexibility Analysis

With respect to claims filed by small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the proposed readoption requires property value diminution claimants to submit several documents to be eligible for compensation from the Fund. For property diminution claims, for example, claimants must obtain professional services from real estate brokers through the multiple listing service or its commercial equivalent. However, the Department does not believe that this requirement imposes substantial costs upon small businesses because it is likely that such claimants would retain a real estate broker or other appropriate professional to maintain and review records to market such as properties even if the rules do not so require. The rules proposed for readoption make no special provisions for property value diminution claimants who qualify as small businesses because any special provisions would impair the Fund's obligation to protect and insure that the taxes credited to the Fund are spent in a proper manner and for the intended purposes.

Statements required under N.J.A.C. 7:11-3.3(a) 11-14 may impose additional reporting obligations on small businesses. However, such reporting requirements are necessary because they implement provisions of N.J.S.A. 58:10-23.11g(e) and 58:10B-13.1. This will result in a positive economic impact because it will ensure that the assets of the fund are spent properly and for the intended purposes. However, the required reporting and certifications may impose some additional costs on small business that may file claims because of the additional time required to compile the necessary information.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies which adopt, amend or repeal any rule adopted pursuant to Section 4(a) of the Administrative Procedure Act, N.J.S.A. 52:14B-4(a), to describe the impact of the proposed rule on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the proposed readoption's impact on smart growth and the implementation of the State Plan. The rules proposed for readoption do not involve land use policies or infrastructure development and therefore, will not have any impact on the achievement of smart growth. The rules proposed for readoption are intended to protect public and environmental health, which are goals of the State Plan.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:11.